Filed 4/11/19 County of San Bernardino v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COUNTY OF SAN BERNARDINO et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,

Respondent;

ROE "K.J.," a minor, etc.,

Real Party in Interest.

E071629

(Super.Ct.No. CIVDS1708919)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Keith D. Davis, Judge. Petition granted.

Wagner & Pelayes, Risa S. Christensen and Dennis E. Wagner, for Petitioners

No appearance for Respondent.

McCune Wright Arevalo, Mark I Richards and Cory R. Weck, for Real Party in Interest.

In this lawsuit, an elementary school student contends that a county is liable for damages because a deputy sheriff wrongfully obtained confidential governmental information about her and disclosed it to another student's parent and a teacher. The trial court denied the county's summary judgment motion.

On this petition for writ of mandate, we find the record contains no evidence that the deputy obtained or disclosed information from an impermissible source. Thus, we grant the petition and issue the writ, directing the trial court to enter summary judgment in favor of the county.

FACTUAL AND PROCEDURAL BACKGROUND

On or about May 2, 2016, Deputy Fred Perez was asked to investigate the theft of a cell phone from a student (Student) at an elementary school. After speaking with the parent of the Student (Parent), Perez went to the school a day or two later. In the presence of the school principal, a teacher told Perez he believed another student (the Real Party in Interest, or RPI) was the phone thief and asked Perez to go easy on RPI because, "When I was meeting with [RPI's] mom at a parent conference I guess she's been you know abused in some pretty horrific ways." This conversation is documented in a transcript of Perez's belt recording. During the investigation, RPI told Perez "one of the people from Big Bear moved down here and it was someone who used to stalk me

and stuff and watch me." This conversation also is documented in a transcript of Perez's belt recording. Perez determined RPI had taken the phone from Student's backpack.

That evening, Perez returned Student's phone to Student and Parent at their home and indicated that RPI had stolen it. Out of the presence of Student, Perez told Parent that RPI would not be prosecuted because of her age. Parent was upset about this. In his deposition, Parent said Perez told him RPI "had a rough time" and had gotten the "short end of the stick" in Big Bear, but did not tell him RPI had been abused. Parent said he did not see the phrase "short end of the stick" as meaning molestation, but rather that, "It could be anything." Perez did not mention anything about RPI's stepfather.

A few days later, around May 9, 2016, Perez ran into RPI and her mother (Mother) at a local laundromat. Perez recognized RPI and asked Mother to step outside to discuss the theft. The transcript of Perez's belt recording indicates he whispered the following questions to Mother, to each of which Mother replied, "Yes": "Did you guys live in Big Bear one time?" "Did something happen?" "Was she molested?" "We've already done a criminal case and all that, right?" Mother explained what had happened to RPI and they discussed the criminal case.

On a later date, Mother went to the school and, based on statements by the teacher and possibly the principal, assumed Perez had obtained information about RPI's abuse history from confidential County of San Bernardino records and wrongfully disclosed it to Parent and to the teacher.

RPI, by and through Mother, sued County and Perez. The causes of action in the first amended complaint (FAC) are: (1) negligence and negligent infliction of emotional distress (Gov. Code § 815.2); (2) violation of the Child Abuse and Neglect Reporting Act (Pen. Code § 11167.5); and (3) invasion of privacy (42 U.S.C. § 1983). The central factual allegation is that Perez wrongfully obtained information about RPI's abuse history from a confidential County source and disclosed it to Parent.

California Law Enforcement Telecommunications System Evidence.

As part of the Motion for Summary Judgment (MSJ) proceedings, County submitted an audit of the California Law Enforcement Telecommunications System (CLETS) as evidence that Perez did not access information from its confidential child abuse files during the phone theft investigation.

MSJ Ruling.

At the hearing on the MSJ, the court focused on the differing versions of events in the record, including the depositions of the teacher, Mother, the principal, Perez, and Parent. The court ruled that County did not carry its burden to show that RPI could not establish at trial that Perez improperly accessed the information from County records or got it from a colleague who had improperly accessed it.

Petitioners filed this timely writ.

DISCUSSION

We review MSJ rulings de novo. (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 81.) "The motion for summary judgment shall be granted if all the

papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) All doubts must be resolved in favor of the party opposing summary judgment. (*Riley v. Southwest Marine* (1988) 203 Cal.App.3d 1242, 1248.)

We have reviewed the petition and the informal response filed by RPI. We have determined that the resolution of the matter involves the application of settled principles of law and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

No Triable Issues of Material Fact

Here, there is no triable issue as to whether Perez improperly accessed confidential County information about RPI's past abuse and disclosed it to Parent. The record, in the form of transcripts from Perez's belt recordings, shows that Perez received the information from Teacher, RPI, and Mother. The record contains no evidence that Perez had details of the information beyond those gained from these three sources.

RPI's responses and supporting evidence to County's statement of undisputed material facts/evidence (Responses) make this clear. RPI is unable to effectively dispute County's Fact No. 32—that "Deputy Perez had not accessed any of plaintiff's child abuse records, he'd gotten the little information he had from [the teacher] and the plaintiff, and then Mother who confirmed a history of abuse." In support of Fact No. 32, Perez points to the transcripts of his belt recordings of conversations with the teacher and Mother, as

discussed above. To dispute this fact, Mother offers only declarations of the teacher[1] and the principal.

First, the teacher testified that during a telephone conversation on May 10 or 11—that is, eight or nine days after the investigation—Perez told the teacher something about RPI's stepfather and a police incident with the family. RPI in the Responses asserts that this conversation between the teacher and Perez took place "well before he met [RPI's] mother in Big Bear" and that "the only permissible inference is he accessed her confidential information." This is contrary to the facts regarding the timing. The teacher testified that this conversation with Perez took place on May 10 or 11, *after* Mother had provided this information to Perez during their conversation at the laundromat (which was on about May 9). This undermines RPI's assertion that from the evidence "the only permissible inference is he accessed [RPI's] confidential information."

Second, in the Responses disputing Fact No. 32, RPI asserted, "Principal Fretz also testified that Perez had accessed the information." The principal did not testify that Perez had accessed confidential information. Rather, the principal testified that she *believed* Perez had divulged the information to Parent, that she had found out about the information from Perez, that *Mother* had told her Perez had looked up the information "on the computer," and that the principal got the "*impression*" that Perez had access to additional information about RPI. However, the principal admitted after hearing Perez's

[1] We hereby grant petitioners' motion to strike RPI's exhibits filed in support of RPI's opposition to this petition. (Calif. Rules of Court, rules 8.124(g).)

belt recording that she had heard the teacher telling Perez about the information on the first day of the investigation, and so she did not initially learn the information from Perez. This is all the evidence that RPI presented in her Responses. The Responses therefore included no evidence that Perez accessed the information from a confidential source.

Apart from the lack of evidence of *accessing* confidential information, RPI lacks evidence of the *disclosure* of confidential information. Both Parent's testimony and RPI's Responses to County's statement of undisputed material facts/evidence make it clear that RPI has no evidence that Perez disclosed the information to Parent or any third party. County's Fact No. 33 states that, "Deputy Perez never disseminated any confidential information that Plaintiff had been the victim of sexual abuse; not to PARENT or any third party." Petitioners supported this statement with excerpts from Parent's deposition. Parent testified that Perez told him RPI "had a rough time" and had gotten the "short end of the stick" in Big Bear, but Perez did not tell him RPI had been abused. Parent said he did not see the phrase "short end of the stick" as meaning molestation, but rather that, "It could be anything." Perez did not mention anything to Parent about RPI's stepfather. RPI in her Responses points only to the evidence discussed *ante* regarding Perez having accessed RPI's confidential information, plus the same testimony that Perez cited—that is, Parent's testimony that Perez told him RPI had a "rough time" and got the "short end of the stick" in Big Bear, which he did not interpret to mean abuse. Thus, RPI offers only Parent's testimony that Perez did *not* tell him RPI had been abused, and the principal's testimony that she believed Perez told Parent about

the abuse, with no underlying support for this belief. This does not create a triable issue of material fact about a disclosure.

To conclude, in response to the County's showing that Perez accessed and disclosed only permissible information, RPI did not create a triable issue that Perez had more information about RPI's abuse history than he had obtained from the teacher, RPI, and Mother. RPI also offered no evidence that Perez told Parent RPI had been abused.

Theories Raised in the FAC.

Finally, petitioners argue the trial court erred when it found a triable issue of material fact as to whether Perez obtained confidential information about RPI by obtaining it from a third party County employee, who in turn obtained the information from confidential County sources on Perez's behalf. This is because, petitioners argue, RPI did not present this theory of liability in her FAC. Petitioners are correct. Under *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, a summary judgment movant need only refute the theories raised in the complaint. Here, the FAC is fairly vague about how Perez obtained the information. More important, nowhere does the FAC allege that Perez obtained the information from another County employee who obtained the information from confidential County sources. County's evidence conclusively establishes that Perez did not access CLETS. Contrary to the trial court's conclusion, petitioners need not have presented evidence that someone did not access CLETS on Perez's behalf, because the FAC simply does not contain that allegation, even if broadly read. In any event, the record contains no evidence that Perez ever possessed more

information about RPI's abuse history than he obtained directly from Mother, RPI, and the teacher.

Petitioners showed in their MSJ that RPI could not prove either that Perez obtained the information from confidential County sources or that he conveyed the information to a third party. Therefore, the MSJ should have been granted.

DISPOSITION

Let a peremptory writ of mandate issue, directing the Superior Court of San Bernardino County to vacate its order denying petitioners' motion for summary judgment and to substitute an order granting the motion.

Petitioners are directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Each party to bear their own costs.

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RAPHAEL
J.

We concur:

CODRINGTON
Acting P. J.

MENETREZ
J.